Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1506

BRADLEY EUGENE SMITH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

(On Petition For A Writ Of Certiorari To The Appellate Court of Illinois, Fourth District)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On March 10, 1976, the State's Attorney of Pike County, Illinois, filed a complaint against Bradley Eugene Smith, alleging that he had violated the term of his probation in the State of Texas. (C. 3). Appearing before the court, Judge Cecil Burrows presiding, the defendant signed a sworn statement of assets and liabilities (C. 8) and was found to be indigent by the Court. (R. 8). The court then appointed Attorney Albert W. Schimmel to represent him. (R. 9). Bail was set at $20,000. (R. 7).

On March 20, 1975, a cash bond of $2,000 was provided by defendant's family (R. 13, C. 12) and he was released.

On April 4, 1975 Attorney Schimmel filed a Petition for Writ of Habeas Corpus (C. 13).

On April 7, 1975 Attorney Schimmel appeared with the defendant before Associate Judge Kolodniej, who at the request of the State and with consent of counsel continued the matter to April 9, 1975. (R. 11).

On April 9, 1975, Attorney Schimmel appeared with the defendant before the court and had the terms of the bond amended to set bond for a definite period so that when the extradition warrant was received from Texas, defendant Smith would not be arrested again and be bound to post an additional cash bond. (R. 11-14). The Court set June 9, 1975 for the hearing on the petition for a Writ of Habeas Corpus and for return of the Governor's Warrant of Extradition.

On June 9, 1975, Attorney Schimmel appeared with the defendant. As the warrant still had not been served on the defendant, the matter was put over until June 16, 1975. (R. 15-16).

On Saturday, June 14, 1975, [Not April 14, 1975 as per the Petition for a Writ of Certiorari, p. 6] the defendant advised his court-appointed counsel that he had been in contact with another attorney, Robert Weiner, and that he desired Attorney Schimmel to withdraw. (R. 18, 22).

Before the case was called on Monday, June 16, 1975, Attorney Schimmel informed the prosecutor of the defendant's desire to replace him and filed a motion to withdraw. (R. 18). Neither Attorney Schimmel nor Attorney Robert Weiner was present in the courtroom when the case of Bradley Eugene Smith was called. The court recessed briefly while the State's Attorney called Attorney Schimmel. (R. 18-19).

When the court reconvened Attorney Schimmel represented to the court that he had tried to call Attorney Weiner at noon and at 1:15 p.m. without success. He also stated that the defendant had tried to call Mr. Weiner. (R. 19).

The court then heard argument on the motion to withdraw. The State's Attorney objected to Mr. Schimmel's withdrawal, stating that the record was clear that the court-appointed attorney had been diligent in representing the defendant and had done everything that could possibly be expected of any attorney: Mr. Schimmel had arranged bond; he had filed a petition for a writ of habeas corpus; he was an experienced attorney doing a substantial amount of criminal work in Western Illinois. The State's Attorney stated that he felt that the Saturday before the Monday scheduled for the extradition and habeas corpus proceedings "would not be a proper time for the defendant to then for the first time say he is unsatisfied or desires that his court-appointed attorney be dropped." (R. 20).

The Court questioned the defendant as to any discontent with Mr. Schimmel's representation of him. (R. 20-21).

> THE COURT: Mr. Smith?
>
> DEFENDANT: I feel we was left out when the warrant was here May 7th and nobody knew about it.
>
> THE COURT: You feel that was Mr. Schimmel's fault?
>
> DEFENDANT: I feel we was left out. I mean we could have—if we knew that the warrant was down here, we could have went ahead with further proceedings and talked to somebody higher.
>
> THE COURT: Well, Mr. Smith, I recall when you were here before that you were apprised that the governor's extradition warrant was here and that was the reason for the continuance until today.

Mr. Schimmel then stated that the defendant had not previously asked for a continuance, and that the defendant was in jeopardy of his liberty and should have his own attorney if he desired one and could afford it. He stated that as an officer of the court he felt obliged to ask that he be discharged since the defendant had said that he did not want him. (R.21-22).

The Court denied the motion to withdraw (R. 23) and a hearing on Defendant's habeas corpus petition was held immediately thereafter. (R. 23-26). The petition for a writ was denied, and Defendant was ordered remanded to the custody of the Sheriff for extradition to Texas. (R. 26-27).

On motion of Attorney Schimmel, the trial court stayed the mandate and continued bond pending appeal. It then found the defendant to be no longer an indigent person and granted Mr. Schimmel's motion to withdraw. (R. 27-29). Since that time Attorney Robert Weiner has prosecuted the appeal.

On September 30, 1976, the Appellate Court of Illinois for the Fourth District denied the defendant's appeal on the question of his alleged deprivation of his right to counsel. A petition for rehearing was denied on November 8, 1976. The mandate was stayed again by affidavit while the petition before the Illinois Supreme Court was pending. On January 25, 1977, leave to appeal to the Illinois Supreme Court was denied. The mandate was stayed once more pending this Court's ruling on the Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS PETITION SHOULD BE DENIED AS THE CONSTITUTIONAL QUESTION POSED BY THE PETITIONER IS NOT RAISED BY THE FACTS OF THIS CASE.

The petitioner has asked that this Court decide whether a non-indigent defendant is denied his right to counsel pursuant to the Sixth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment, when a State Court denies a motion for substitution of his privately retained attorney for counsel theretofore appointed by the Court. The question posed by petitioner is not raised by the facts of this case.

A.

There Is no Constitutional Right To Counsel In Extradition And Habeas Corpus Proceedings.

The question raised by petitioner comes before this Court in the context of a rendition proceeding and a petition for a writ of habeas corpus incident thereto. There is serious doubt that the Sixth Amendment right to counsel extends to such proceedings which are summary in nature. *Munsey* v. *Clough*, 196 U.S. 364, 25 S. Ct. 282 (1905).

The Constitution, Art. IV, § 2, cl. 2, provides:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the Crime.

The provision "contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him . . ." *Sweeney* v. *Woodward*, 344 U.S. 386, 391, 73 S. Ct. 139, 141 (1952). A rendition warrant may therefore be constitutionally issued once the governor is personally satisfied that the person held is the person charged in the demanding state; that he is charged with a substantial crime; and that he was present in the demanding state at the time of the offense charged. *Pettibone* v. *Nichols*, 203 U.S. 192, 27 S. Ct. 111 (1906). No hearing is required in anticipation of issuance of the warrant. *See, Feilke* v. *Governor*, 414 F. Supp. 10 (E.D. Pa. 1976) (Prisoner does not have constitutional right to receive notice of and participate in extradition proceedings); *United States ex rel. Fort* v. *Meizner*, 319 F. Supp. 693 (N.D. Ill. 1970) (Same). In fact, this Court has held that there is no violation of a criminal defendant's constitutional rights when a prosecuting state by-passes the asylum state's extradition procedures altogether. *Frisbie* v. *Collins*, 342 U.S. 519, 72 S. Ct. 509 (1952). Clearly, no counsel is required.

Nor does the habeas corpus proceeding brought to challenge extradition vest in the accused all the procedural protections of a criminal trial. *See, United States* v. *Flood*, 374 F. 2d 554, 557 (2nd Cir. 1967); *Feilke* v. *Governor*, 414 F. Supp. 10 (E.D. Pa. 1976); *People ex rel. Millet* v. *Babb*, 1 Ill. 2d 191, 115 N.E. 2d 241 (1953).

The courts and governor of the asylum state are ordinarily entitled to assume that the fugitive's constitutional rights, including his right to counsel in his defense of the criminal charges, will be protected in the demanding state. *Marbles* v. *Creecy*, 215 U.S. 63, 30 S. Ct. 32 (1909).

In any case, since habeas corpus is a civil proceeding, as a general rule there is no right to counsel, *United States*

v. *Parman*, 149 App. D.C. 117, 461 F. 2d 1203 (D.C. Cir. 1971); *Flowers* v. *Oklahoma*, 356 F. 2d 916 (10th Cir. 1966); *United States ex rel. Wissenfeld* v. *Wilkens*, 281 F. 2d 707 (2nd Cir. 1960). The habeas corpus hearing pursuant to a rendition warrant, confined as it is to the same questions on which the governor bases his decision, does not present the special circumstances in which one would expect absence of counsel to infect the fairness of the proceedings.

The Massachusetts Supreme Judicial Court, considering a claim that counsel had been denied a petitioner for his extradition-habeas corpus proceedings, has concluded that there is no such right:

> [4, 5] The defendant's final contention is that he was denied counsel at the rendition hearing in Texas, which was a "critical stage of the proceedings against * * * [him]," and that he could not intelligently waive his "rights." There was conflicting evidence as to the degree of the defendant's understanding of the proceedings, the advice he was given, and his alleged decision to forgo the assistance of counsel until he returned to Worcester. We do not find it necessary to resolve the question whether his waiver was intelligent or whether he was adequately informed or his rights to counsel. "*Miranda* does not apply to rendition * * * hearings * * * Interstate rendition proceedings are summary in nature and the accused is not entitled to all of the procedural protections of a criminal trial." United States v. Flood, Warden, 374 F. 2d 554, 557 (2d Cir.).

Commonwealth v. *Glavin*, 354 Mass. 69, 235 N.E. 2d 547 (1968).

Similarly, this Court need not reach the question of whether the Sixth Amendment requires that appointed counsel be replaced with retained counsel when a non-indigent defendant asks that it be done, since neither the Sixth Amendment nor due process require counsel at all in these proceedings.

B.

Even If The Right To Counsel Extends To Extradition Proceedings, The Facts In This Case Show That The Court Acted Consistently With Settled Law In Refusing To Permit Appointed Counsel To Withdraw When Substitute Counsel Was Not Available On The Day Scheduled For Extradition Proceedings.

Were this Court to decide Due Process required that the right to counsel be extended to extradition proceedings, this case would still not be an appropriate one to consider petitioner's contention that if the right to counsel is to have meaning, the non-indigent defendant must be able to substitute the counsel of his choice for court-appointed counsel.

Petitioner's statement of facts is entirely inadequate for a consideration of the issues in this case. It contains serious errors of chronology and omits almost all reference to the record of continuing legal assistance provided by court-appointed counsel. It states that Attorney Robert Weiner talked with appointed counsel on Saturday, June 14, 1975, previous to the scheduled habeas corpus hearing on Monday, June 16, 1975. Mr. Weiner advised Mr. Schimmel that if he would file a motion to withdraw and the motion were approved, he would enter his appearance in this case. (Petition, 4, C. 19). Yet, peitioner's statement of facts ignores entirely the fact that on June 16, 1975, when the motion to withdraw was filed and heard, Mr. Weiner was not present nor available to take over the defense of Mr. Smith. Appointed counsel appeared and informed the Court that he had been unable to communicate with Mr. Weiner either of two times, when he had tried to reach him. (R. 19).

In fact, therefore, petitioner was asking for a continuance when the extradition procedures had already been extended over more than three months. The Court's refusal to grant the motion to withdraw, which would necessarily have lead to further delay, was well within the Court's powers, absent any compelling reason to believe that petitioner's interests were not being adequately served by appointed counsel.

This Court has already decided that when a defendant is given a constitutionally adequate time to retain counsel, refusal to delay proceedings further to permit the defendant to retain counsel is not an abuse of discretion, even if the defendant must proceed without counsel. In *Ungar* v. *Sarafite,* 376 U.S. 589, 84 S. Ct. 841 (1964), defendant Unger was served with an order to show cause for why he should not be held in contempt on a Thursday, the hearing being scheduled for the following Tuesday. Ungar appeared with counsel on the day of the hearing and asked for a continuance in order to secure another attorney. The second attorney appeared and requested a further continuance so that he could be available and become familiar with the case. The court denied the motion, ruling that Ungar's five-day notice had been adequate to permit him to retain counsel who would be available at the time of the scheduled hearing. Upon this record, this Court concluded that the decision as to whether to grant a continuance in order to permit replacement of counsel was addressed to the discretion of the trial court; that five days was not a constitutionally inadequate time to retain counsel; that there had been no abuse of discretion; and that Ungar had not been deprived of his Sixth Amendment right to counsel, even though he was not represented by counsel during the contempt proceedings.

In the instant case, the petitioner had been free on bond since March 20, 1975 and at the time of the hearing was employed at a job paying $9.25 per hour (C. 1; R. 30). He had ample time to retain his own attorney. Yet he waited until two days before the scheduled hearings to arrange for an attorney and until the very day of the hearings to ask the court to substitute attorneys because he was no longer indigent. As in *Ungar,* Bradley Smith had an obligation to retain counsel who could be available for the scheduled hearing. "An accused's right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in the courts of justice." *Relerford* v. *United States,* 309 F. 2d 706, 708 (9th Cir. 1962).

Various circuits of the United States Court of Appeals have already applied *Ungar* v. *Sarafite, supra,* to cases involving a motion for substitution of counsel. They are in accord that if such a motion comes on the eve or the day of trial and will have the effect of delaying proceedings, denial of the motion is proper, unless there are substantial reasons to grant the motion. *Bowman* v. *United States,* 409 F. 2d 225 (5th Cir. 1969) *cert. denied* 398 U.S. 967, 90 S. Ct. 2183, *rehearing denied* 400 U.S. 912, 91 S. Ct. 128, (1970) (sustaining denial of a request for substitution of new appointed counsel or continuance on day of trial to obtain counsel when no showing of inadequacy of appointed counsel); *United States* v. *DiTommaso,* 405 F. 2d 385 (4th Cir. 1968) *cert. denied* 394 U.S. 934, 89 S. Ct. 1209 (1969) (sustaining denial of request for replacement of appointed counsel on eve of hearing on motion to suppress and trial when no evidence of inadequate representation); *United States* v. *Llanes,* 374 F. 2d 712, 717 (2nd Cir.), *cert. denied* 388 U.S. 917 (1967) (sustaining denial of request for different appointment two days before trial); *United States* v.

Cozzi, 354 F. 2d 637 (7th Cir. 1965) *cert. denied* 383 U.S. 911, 86 S. Ct. 896 (1966) (sustaining denial at time of scheduled trial of motion of retained counsel to withdraw in favor of other retained counsel who was present in courtroom).

In *Cleveland* v. *United States,* 322 F. 2d 401 (D.C. Cir.), *cert. denied,* 375 U.S. 884, 84 S. Ct. 157 (1963), a case closely parallel to the petitioner's the defendant argued as here that he had been deprived of his constitutional right to counsel when the assignment judge on the day of the trial refused to grant a two-day continuance so that retained counsel could replace his appointed counsel. As here, appointed counsel asked to be replaced because the defendant had told him he did not want him. The District of Columbia Circuit stated:

> Of course the right to counsel is one of the important basic rights, and the right to choose one's own counsel is a vital element in that basic right. Troublesome questions can arise in this field. In the case before us counsel for Cleveland earnestly presses upon us the view that the upshot of the assignment judge's refusal to continue the trial for two days was that the defendant was required to face a serious criminal charge represented by a lawyer "he didn't want" and a lawyer who himself felt that he could not "give the defendant the most effective * * * assistance of counsel possible." Counsel urges that when the constitutional right is pitted against the inconvenience of delay a substantial presumption must be indulged in favor of the former. This is true, but in the case at bar Cleveland is not asserting a bare right to counsel or to choose his own counsel. He had first chosen to have the court appoint counsel for him; this was done. He then chose to have a lawyer from the Intern program; this was granted. Then on the day of trial he advanced a third choice, i.e., retained counsel. The problem here is not the

> right to counsel or the right to counsel of the defendant's choice. It is whether another continuance was required to allow the defendant to exercise the right to a third choice. I think that, under the circumstances this case, the assignment judge could reasonably have concluded that it was not. Id. at 402-403.

The facts of this case present no compelling reasons to have permitted substitution of retained for appointed counsel. Appointed counsel, an experienced lawyer, had worked on the case for three months. He had repeatedly represented the defendant's interests--to assure him bond, to assure he did not have to pay additional bond, to demand a habeas corpus proceeding and to insist that the extradition warrant be returned or his client be discharged. There was no conflict between the judge and counsel. See, *United States* v. *McMann,* 386 F. 2d 611 (2nd Cir. 1967). There was no irreconcilable bona fide dispute with appointed counsel. *People* v. *Williams,* 386 Mich. 565, 194 N.W. 2d 337 (1972). In fact, when the court questioned defendant Smith, Mr. Smith found no fault with Mr. Schimmel's representation of him. (R. 20-21). Once the court denied the motion to withdraw, Mr. Schimmel continued to represent his client zealously, complaining that a copy of the warrant had never been served on the defendant and moving that bond be continued pending appeal.

In summary, retained counsel was not available at the scheduled habeas corpus hearing; appointed counsel diligently served his client. Therefore, the decision of the Circuit Court of Pike County, Illinois could be sustained as an act within its discretion and consistent with the sound administration of justice without reaching the question raised by petitioner.

CONCLUSION

For the foregoing reasons, respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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